

Howard Besser's prepared testimony before Copyright Office 2/10/99 Los Angeles

Public Hearing on *Promotion of Distance Education Through Digital Technologies*

My credentials: I am a faculty member at both UCLA's School of Education & Information Studies and UC Berkeley's School of Information Management & Systems, with extensive experience in employing new technologies to teach students at remote locations. I have written over half a dozen articles on using new technologies to teach. I've edited the special issue of the *Journal of the American Society for Information Science* devoted to Distance Independent Learning. I'm currently supervising a large grant to help faculty on the Berkeley campus put their courses on the WorldWide Web. In addition, I've written two articles on copyright, host a web page of Copyright and New Information Technology links (<http://www.sims.berkeley.edu/~howard/Copyright/>), and am a member of the National Academy of Sciences/National Research Council's panel on Intellectual Property Rights in the Emerging Information Infrastructure. But in my remarks here today, I am not representing the National Academy. I am representing the distant learning instructors of UC Berkeley and the national Progressive Librarians Guild. I am also representing the views of two affiliates of the American Library Association -- the Association of College and Research Librarian's Alliances for New Directions in Teaching and Learning and the Video Roundtable.

Importance of Fair Use in Teaching: Fair Use is absolutely critical to the instructional process, and has been for some time. Any teacher, from K-12 to higher education who tries to be interesting or engaging frequently needs to invoke Fair Use. While the lengthy process to request rightsholder permission to use a work poses no problems for curricular support material used every time a particular unit is taught, teachers cannot follow this time-consuming process when the need arises to teach a unit in a different way. Creative teachers need the flexibility to respond to current events and incorporate these into classroom discussions. Teachers who want to motivate their students need to be able to respond to topics their students bring up, and to quickly find unanticipated material which they can weave into the learning objectives of the course. Often this involves having the students examine carefully selected short excerpts from copyrighted material, and this kind of use cannot economically harm the rightsholder because they excerpts have little value by themselves (and even if they had value, the schools and students have few resources to expend on these). Teachers need to use material in this way in order to "provide for the general welfare" and "promote progress in science and the useful arts" by motivating their students to learn. This is what our country's founders had in mind, and it is exactly what the Fair Use doctrine is all about.

Fair Use is even more important in a Distant setting: In a conventional course, teachers often put timely analog materials on reserve in a library where their students can review the material. In distance course, often the only way to get timely analog material to students is to digitize it and provide network access to it. For an instructor in a distance setting who wishes to link a topic raised by the students to the curriculum, it is critical for that instructor to be able to show students excerpts from newspaper articles, poems, works of fiction, etc. And because of the distance, often the only way to do this is to invoke Fair Use and make the excerpts available to the students in digital form.

Anti-circumvention: Most people anticipate that rightholders will implement protection mechanisms to prevent commercial exploitation of their digital works. Under anti-circumvention legislation, faculty who try to make Fair Use of a work that has been digitally protected may find

themselves engaging in criminal activity, even if they would have had a legal right to that Fair Use if the material was in analog form. Teachers do not want to prevent rightsholders from realizing commercial gain from their works (indeed, many of us are content creators who sell our works commercially). But regulations and technical protection mechanisms designed to prevent unlawful commercial exploitation can also work against those of us who need to use short timely excerpts of material for non-commercial educational purposes. Teachers must have access to the raw materials they need in order to teach, and we do not want to constantly have to engage in criminal activities when we're just trying to do our jobs.

Licensing cannot replace Fair Use: Many rightsholders believe that licensing schemes should replace Fair Use. Elsewhere ("The Erosion of Public Protection: Attacks on the Concept of Fair Use", 1998 CONFU Fair Use debate, and "Recent Copyright Law Changes Threaten the Public Interest, Peace News, forthcoming) I have outlined moral, social, and educational reasons why this is not a good idea. Here I will address pragmatic reasons. First of all, as my study of a large 2 year image distribution consortium discovered ("The Cost of Digital Image Distribution: The Social and Economic Implications of the Production, Distribution and Usage of Image Data" <http://sunsite.berkeley.edu/Imaging/Databases/1998mellon/>), much of the material that teachers need in order to effectively teach will not be distributed by any digital licensing body for at least a decade (and may never be distributed that way). For a long time to come, teachers will need to obtain access to materials in other ways (which, for distance instruction using materials not in digital form may involve creating temporary digital copies).

A second pragmatic reason why licensing won't be able to effectively replace Fair Use in the near future is the time and effort it takes to process the licensing of a piece of material. Teachers are under tremendous time pressures to cope with their teaching load, and cannot possibly execute a series of licenses to use material. Even if the licensing process is streamlined to take only one minute per license, a teacher who uses dozens of excerpts in an hour would not have the time to execute all those licenses. Though blanket licenses would certainly help solve an instructor's time problems, the vast majority of materials needed will not fall within a blanket license.

A third pragmatic problem with licensing involves the vast number of possible uses that might be made of the material. No taxonomy of possible uses I have seen has covered the enormous number of uses a teacher might make of material, particularly in a distant setting. Most of these taxonomies are designed for commercial uses, and most do not provide for any kind of Fair Use. And if such a system got complex enough to handle the plethora of uses around distance instruction, the time it would take an instructor to declare an intended use from such a long list of possibilities would likely be prohibitively long, and would inhibit the instructor from the spontaneity of new uses while interacting with students.

A fourth pragmatic problem with licensing systems is that ***Authentication systems are not robust enough:*** The level of granularity that authentication systems need in order to offer the right access level to all university users is a very difficult problem to resolve. Much of the problem comes from the fact that any given user might belong to variety of different classes, each falling into a different permission or payment level. (For example a graduate student might also be a teaching assistant in enough of a supervisory role that, for all practical purposes, they are an instructor.) Even though some of the best minds have been working for years on these types of authentication systems, many serious problems have not been resolved. My own distance teaching has proved unresolvable to the UC Berkeley system. That system identifies current faculty based upon payroll records, and each time they reload payroll records, I drop out of the system and lose all my permissions (because I am currently entirely on payroll at UCLA, not UC Berkeley). If this kind of problem happens at sister institutions (part of the same University of California system), imagine the problems for distance

learning faculty shared between unconnected schools!

Importance of maintaining flexibility with changing technological environments: Adoption of new technological developments seldom happens within restrictive environments. When we are prescriptive about what is allowable, the precise things we allow may flourish, but all kinds of other things are stymied before they even start. By being too narrow and precise in defining allowable uses at the early stage of technological development, we inhibit new, interesting and exciting uses. Think if what would have happened if, in 1980, we had followed the wishes of Hollywood studios and defined home videotaping as an infringing act that harmed the motion picture studios: it's likely that the videotape industry would have never taken off, and the Hollywood studios would be financially much worse off than today (as they earn half their revenues from the videotape market). We must avoid moving too quickly to restrict new uses, or we will stifle the creativity and innovation that are vital for growth and development. This is true in both the commercial sector and in educational development. We need to give new technological environments the time to play out, and intervene when we can clearly see that the harm outweighs the good.

In the early stages of an innovation, rightsholders tend to be overly protective and overly cautious, and innovators need to be able to cross some rightsholder-imposed boundaries in order to innovate. This over-cautiousness led the entertainment industry to oppose the VCR 20 years ago, and is leading the recording industry to oppose technological developments like the Rio today. As a Distance Learning instructor, I've faced this over-cautiousness, and had to invoke a combination of Fair Use and the Distance Learning exemption in order to teach in this environment. For many years I've taught a class on the social effects of new information technologies. This class focuses on current events and how they are handled by the media. Every week I bring in recent newspaper clippings for class discussion, often clippings from that morning's paper. Preparing to teach a Distant Learning class in 1993, I contacted the New York Times offering to pay for a digital subscription for my students so that we could discuss these articles in class. In the ensuing discussion with the Times, they not only refused to sell me a subscription, but they contended that I had no right to make claims of a Fair Use or Distance Learning exemption. On my belief in these exemptions I went ahead and used the material in digital form, but I don't know if I would have done so without these protections. This has become a very popular class (I've taught it for 10 years), and I've gone on to be an innovator in the Distance environment, neither of which would have happened if I hadn't been able to rely on those exemptions. And today the Times (which then had never heard of the WorldWide Web) has developed both free and marketing arrangements for their newspaper content in electronic form.

Distance Learning environments were given special exemption under the 1976 Copyright Act because they were perceived as a fragile new environment that had social benefits. Distance Learning is still a fragile new environment with social benefits. And with many years of a Distance Learning exemption behind us, rightsholders have still not suffered significant harm. Yet the failure to continue the Distance Learning exemption into the digital environment will be the deathnell of that environment.

Likely ruin of a growth industry: Though colleges and universities see Distance Education (and particularly life-long learning) as a major growth area, this entire growth area is likely to be stunted and scrapped by protectionist copyright laws. In the upcoming years, distance learning will need to rely on easy employment of a moderate amount of copyrighted materials just to create a market for distance learning services. Teaching in a distant learning environment is often frustrating enough for both students and teachers; having to cope with overly restrictive protectionist copyright regulations would ruin the industry.

CONFU is not a model: It would be a mistake to put forward the CONFU CCUMC guidelines as a model for cooperation between rightsholders and users. The guidelines are perceived as overly strict and absolutely unacceptable by many educational groups including the National School Boards Association, the American Association of School Administrators, the National Education Association, and the National Association of Independent Schools (see their stern letter to Senator Hatch at

http://www.ninch.org/ISSUES/COPYRIGHT/FAIR_USE_EDUCATION/CONFU/NSBA.html).

Many other educational associations have gone on record opposing these guidelines, and do not feel at all bound by them (see the report by the National Initiative for a Networked Cultural Heritage at http://www.ninch.org/News/CONFU_Report.html).

Keeping a record of Distant Learning Activities: To keep a record of distant learning activities, one needs to record those activities in some format (usually analog or digital video). In the course of recording those activities, inevitably one will be recording copyrighted materials which are being presented to the class. Even if rightsholder use restrictions are met during the class presentations, it is unlikely that these use restrictions (particularly those from generic or blanket licenses) permit the recording of the session. For archival and historical purposes, as well as for the pedagogical aim of improving teaching and learning, it is imperative that we be allowed to record a representative sampling of distant learning activities. We have already lost much of the earliest history of computer use in education and communication (we don't even know what was the first email message sent).

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Howard Besser's notes for oral testimony before Copyright Office 2/10/99 Los Angeles

Public Hearing on *Promotion of Distance Education Through Digital Technologies*

My background

- faculty at both UCB & UCLA's School of Educ & Info Studies
- one of my key specialty areas for research is in Teaching with New Technologies, and I've done quite a bit of research on Dist Learning, edited a special issue of a Journal on the topic, etc.
- I've also written a couple of articles on Copyright, and I serve on a National Academy of Sciences panel on Intellectual Property Rights in the Emerging Information Infrastructure
- I'm here representing Dist Learning instructors at UCB, and my written remarks have been endorsed by several library and computer groups, including Computer Professionals for Social Responsibility, the Progressive Librarians Guild, etc.
- I'm mainly coming here to you today as a researcher on educational technology, and as a spokesperson for teachers who are trying to be interesting and engaging, and to help their students learn

It will take too long to detail all my written remarks, so I'll just focus on a few key points here:

- Teaching a Distance Learning Course is HARD
- To be a decent teacher, you need flexibility
- Licensing schemes and other prior permission-seeking inhibit teaching flexibility
- Teachers need to be able to use various types of media, whether they are fictional or not.
- Distance Learning and educational innovation will drastically suffer (and probably wither) if the section #110 exemptions are not extended to allow the same performance and display in a distant digital environment that we currently have in the classroom

Teaching with technology is very very difficult, and distance learning makes it even worse. My research has shown:

Call attention to my Mellon Foundation report on teaching with digital versions of still images
<<show handout>>

- Technical, logistical, & support difficulties <<read frm Mellon sponsored report publicly released 2 days ago>>
- Specific problem of curricular support materials (course readings) for distance learning <<refer to my JASIS article>>

To be a decent teacher, you need flexibility

- Any teacher, from K-12 to higher education who tries to be interesting or engaging, frequently needs to make use of a wide variety of copyrighted material
- If you teach the same way every time you teach a unit, you can obtain prior permission, arrange licensing, etc.
- But creative teachers need the flexibility to respond to current events and incorporate these into classroom discussions. Teachers who want to motivate their students need to be able to respond to topics their students bring up, and to quickly find unanticipated material which they can weave into

the learning objectives of the course.

- Obtaining permission to use content is often extremely time-consuming and in effect prevents this type of responsive teaching

Licensing schemes and other prior permission-seeking inhibit teaching flexibility

- Much of the material that a teacher needs will not be part of any blanket licensing agreement
 - The vast amount of time required to negotiate permission with a rightsholder is prohibitive. Let's look at an example to illustrate this point:
 - An art history teacher wants to show slides to her students in a same-time/different place arrangement. Her university has signed a license with AMICO, but AMICO will only have a small fraction of the images she needs (because many of them are not the kind that come from North American Museums from previous centuries). Say it only takes her an hour to research and obtain permission to use an image (that's an extremely low estimate of the time required). If she shows the average 100 images/week that many art history classes show, she's spending 100 hours/week just clearing rights.
 - Licensing schemes are negotiated for general use; the model seldom fits innovative uses or new technologies. In addition, these are often unequal partnerships, with the content-holder dictating the terms and the school having to either take it or leave it.
 - So a library's license for content might cover on-campus use, or use by students in a "regular" program.
 - A licensor probably wouldn't license content for use by distant-ed students. It might take years of negotiation for the university to convince the licensor that a particular type of distant technology should be part of a license, and by then there would be some still newer technology that instructors would need included.
 - The licensor is likely to have a strict (or at least a conventional) view of what constitutes the body of users they are licensing to. Distant learners typically don't fit that category. And I know from my own experience, that distant teachers fall through the cracks as well. Because my paycheck comes from UCLA, I drop out and lose my access privileges every time they reload the UC Berkeley payroll records that the UCB library uses for authentication of users of digital content.
 - In terms of granting licenses or any other types of permission, content-holders do not respond well to new technologies. Their response is usually one of over-protection, and frequently acts to inhibit these new technologies from being used. Another story from my personal experience:
 - -Preparing to teach a Distant Learning class in 1993, I contacted the New York Times offering to pay for a digital subscription for my students so that we could discuss these articles in class. In the ensuing discussion with the Times, they not only refused to sell me a subscription, but they contended that I had no right to make claims of a Fair Use or Distance Learning exemption. On my belief in these exemptions I went ahead and used the material in digital form, but I don't know if I would have done so without these protections. This has become a very popular class (I've taught it for 10 years), and I've gone on to be an innovator in the Distance environment, neither of which would have happened if I hadn't been able to rely on those exemptions. And today the Times (which then had never heard of the WorldWide Web) has developed both free and marketing arrangements for their newspaper content in electronic form.
- by the way, if this hearing today had been a distance learning classroom, and my presentation had been one of a teacher, I couldn't have used the handout that I gave you a few minutes ago. To get permission to show you those excerpts took more than a week and countless hours of my time. And these came from an article that

- I myself wrote
- in a journal issue that I edited
- and I knew all the people in the permission office of the publisher
- and I even visited the head of the rights dept in person

Think about the poor distant learning instructor who doesn't have any personal connections, and might not even know who to ask for permission.

Teachers need to be able to use various types of media, whether they are fictional or not. The use of fictional media as part of a class often financially enhances rather than harms the rightsholder. Another example from my own experience:

- I teach a multimedia class. In order to teach my students about how these things are made, what constitutes good design, etc., I need to show actual multimedia products to the students in the classroom. I also need the students to examine them rigorously, and to write reviews of them. I then post these reviews in a publicly-accessible place on the Web.
- I know for a fact that after seeing the software in class, many of my students have gone out and purchased their own home copies. They have told their friends and their friends have purchased copies. And people who have seen these multimedia reviews on the Web have sent me email thanking me for the review and mentioning that THEY have purchased copies based upon my students' reviews.
- So, instead of distance class use of multimedia programs harming the rightsholder, my classroom use has acted as free advertising for the products.

In summary, Distance Learning and educational innovation will drastically suffer (and probably wither) if the section #110 exemptions are not extended to allow the same performance and display in a distant digital environment that we currently have in the classroom

- It's hard enough to be innovative and use new technology for teaching
 - Teachers won't continue to teach in innovative ways if they have to worry about prior permissions and licenses, and students and learning will suffer if teachers can't be innovative and don't have the flexibility to interweave new topics that come up in class
 - Teachers won't teach in innovative ways if they don't have affirmative distance learning exemptions. Teachers are role models for their students and don't want to risk violating the law. This problem can get even more acute when material encrypted or otherwise protected.
- Teachers need affirmative classroom and distance learning exemptions in order to "provide for the general welfare" and "promote progress in science and the useful arts" by motivating their students to learn. This is what our country's founders had in mind, and it is exactly what copyright is all about.

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